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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LOWER PASSAIC RIVER STUDY AREA
COOPERATING PARTIES GROUP,

Plaintiff,

v.

U.S. ENVIRONMENTAL PROTECTION
AGENCY,

Defendant.

HON. JOSE L. LINARES

Civil Action No. 15-CV-7828 (JLL)(JAD)

LOCAL CIVIL RULE 56.1 STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

Pursuant to Rule 56.1 of the Local Civil Rules of the United States District Court for the District of New Jersey, defendant the U.S. Environmental Protection Agency (“EPA”), by its attorney, Paul J. Fishman, the United States Attorney for the District of New Jersey, states that there is no genuine issue to be tried with respect to the following facts:

I. The Lower Passaic River / Diamond Alkali Site

1. The Passaic River is 80 miles long. With headwaters in southern Morris County, it passes through rural, suburban and urban areas, draining a watershed of 935 square miles, to empty into Newark Bay. The Lower Passaic River is the 17-mile tidal stretch of the river, from Dundee Dam to Newark Bay. Three major tributaries (Saddle River, Third River and Second

River) bring water into the Lower Passaic River's main stem, which is used for recreation and navigation, among other uses. See Declaration of Walter Mugdan, dated May 13, 2016 ("Mugdan Decl."), ¶ 4.

2. Starting in the 1800s, the Passaic River was one of the major centers of the American industrial revolution. By the beginning of the 20th Century, a number of industrial operations, such as manufactured gas plants, paper manufacturing facilities, petroleum refineries, shipping, tanneries, creosote wood preservers, metal recyclers and manufacturers of materials such as rubber, rope, textiles, paints and dyes, pharmaceuticals and chemicals, had located along the river's banks as cities like Newark grew. Industrial operations and municipalities used the river for wastewater disposal. This history of industrial development surrounding the Lower Passaic River resulted in the conditions that can be observed today, including contaminated sediments and surface water, and degraded habitat. *See* Lower Passaic River Restoration Project Fact Sheet at <http://passaic.sharepointspace.com/Public%20Documents/fact.pdf>. See Mugdan Decl. ¶ 5.

3. In 2002, EPA formed a partnership with the U.S. Army Corps of Engineers-New York District (the "Corps-NY"), the New Jersey Department of Transportation ("NJDOT"), the New Jersey Department of Environmental Protection ("NJDEP"), the National Oceanic and Atmospheric Administration ("NOAA") and U.S. Fish and Wildlife Service ("USFWS") to conduct a joint study that would bring each agency's authorities to bear on the complex environmental problems of the Lower Passaic River. The goal of the Lower Passaic River Restoration Project is to remediate contaminated sediments, improve water quality, restore degraded shorelines, restore and create new habitats and enhance human use along the Lower Passaic River and in several tributaries from Dundee Dam near Garfield, to Newark Bay. One

aspect of the Lower Passaic River Restoration Project is EPA's effort to address contaminated sediments under CERCLA. See Mugdan Decl. ¶ 6.

4. The Lower Passaic River is being investigated and addressed as by EPA part of the Diamond Alkali Superfund Site. In the early 1980s, investigations by EPA and NJDEP found soil contaminated with dioxin at the former Diamond Alkali manufacturing facility located at 80 Lister Avenue, in Newark, NJ, next to the Passaic River. Cleanup work was initiated and, in 1984, EPA added the Diamond Alkali site to the National Priorities List, identifying the site as one with the most significant risk to human health and the environment. EPA and NJDEP also identified contaminants, such as metals, persistent organic chemicals, pesticides and dioxin, in the sediments of a six mile stretch of the Lower Passaic River adjacent to the former manufacturing facility. In 1994, under EPA oversight, Occidental Chemical Corporation began a remedial investigation of this six mile stretch. The investigation found elevated concentrations of contaminants that originated from the former Diamond Alkali manufacturing facility, as well as other contaminants not clearly linked to the former facility's operations. See Mugdan Decl. ¶ 7.

5. As documented in the Record of Decision for the Lower 8.3 Miles, the six mile study, and studies by the Corps-NY and other agencies, showed that contaminated sediments and other sources of hazardous chemicals were potentially present along the 17 Miles. Therefore, EPA decided to expand the study of the Passaic River to include the entire 17 Miles, from Dundee Dam to Newark Bay. See Mugdan Decl. ¶ 8.

6. EPA started work on the remedial investigation/feasibility study ("RI/FS") for the 17 Miles using federal funds. In 2004, EPA signed an administrative settlement agreement under Section 122(h) of CERCLA with a number of potentially responsible parties ("PRPs"), which

provided funding for EPA to perform the 17 Miles RI/FS. The settlement agreement was amended in 2005 and 2007, adding more parties. In 2007, the settling parties entered into a new administrative settlement agreement and order on consent (the “2007 AOC”) with EPA, taking over the performance of the 17 Miles RI/FS from EPA. See Mugdan Decl. ¶ 9.

7. While the 17 Miles RI/FS was underway, in 2006, the EPA concluded that, since the Lower 8.3 Miles contain the bulk of the contaminated sediment, addressing this portion of the river first would better support the overall protection of human health and the environment than would awaiting the outcome of the 17 Miles RI/FS to make a decision for the entire Lower Passaic River. Therefore, EPA undertook a targeted investigation, or Focused Feasibility Study (“FFS”) of the Lower 8.3 Miles. As described in Paragraphs 21 to 28 below, EPA has now selected a cleanup for the sediments of the Lower 8.3 Miles and will pursue those parties responsible for the contamination to perform or pay for both the cleanup, and to recover EPA’s unreimbursed past costs incurred in studying and selecting a remedy for the Lower 8.3 Miles. See Mugdan Decl. ¶ 10.

II. Superfund Background and Process

8. CERCLA, commonly known as the Superfund law, was enacted by Congress on December 11, 1980. Among other things, this law provides broad Federal authority to clean up uncontrolled or abandoned hazardous waste sites as well as accidents, spills, and other emergency releases of pollutants and contaminants into the environment. Under CERCLA, EPA is authorized to seek out those parties responsible for current or past releases and assure their cooperation in the cleanup. EPA may enter into settlement agreements and consent decrees with PRPs requiring them to perform work under CERCLA without compromising the agency’s right

to recover for any work or costs not specifically addressed by the agreements, including future work needed to effectuate cleanup of the contaminated site. See Mugdan Decl. ¶ 11.

9. CERCLA investigations and cleanups follow, to the extent practicable, the National Oil and Hazardous Substances Pollution Contingency Plan (more commonly known as the National Contingency Plan or “NCP”), promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, et seq., including all amendments thereto. The NCP provides the guidelines and procedures to respond to releases and threatened releases of hazardous substances, pollutants, or contaminants. See Mugdan Decl. ¶ 12.

10. In addition to EPA’s authority to undertake response actions, under CERCLA Section 104, PRPs, which are people or entities potentially responsible for a release of hazardous substances into the environment, may conduct certain response actions in accordance with CERCLA Section 122, if EPA determines that the action will be done properly and promptly. See Mugdan Decl. ¶ 13.

11. CERCLA authorizes two kinds of response actions: 1) actions taken to address releases or threatened releases requiring prompt response (short-term removals), and 2) actions that permanently and significantly reduce the risks associated with releases or threatened releases of hazardous substances that are serious, but not so urgent as to require an immediate response (long-term remedial response actions). Long-term remedial response actions can be conducted only at sites listed on EPA’s National Priorities List (“NPL”), which identifies the sites with the most significant risk to human health and the environment. The Diamond Alkali Site, which includes the Lower Passaic River and Newark Bay, is one such site and as noted above, is listed on the NPL. See Mugdan Decl. ¶ 14.

12. At the time a site is listed on the NPL, EPA (or the state, acting as lead agency) begins an RI/FS. An RI/FS can be performed for the site as a whole, or for a particular portion of the site called an operable unit. The investigation and cleanup of a site can be divided into a number of operable units, depending on the complexity of the problems associated with the site. See Mugdan Decl. ¶ 15.

13. During an RI/FS, the lead agency (federal or state) either gathers or oversees the gathering of information by another entity such as a PRP, to support an informed decision regarding which remedy (if any) is most appropriate for a given site or an operable unit within a site. In general, the objectives of the remedial investigation (“RI”) portion of the RI/FS are to determine the nature and extent of the contamination at the site or operable unit and assess risks to human health and the environment from this contamination. The RI may also include tests to evaluate the potential performance and cost of the treatment technologies being considered for addressing the risks. See Mugdan Decl. ¶ 16.

14. In characterizing the site or operable unit, the lead agency or PRP identifies the source of contamination, potential routes of migration, and current and potential human and environmental receptors. A baseline risk assessment conducted during the RI estimates what risks the site or operable unit poses now and would pose in the future if no cleanup action were taken. Thus, the RI provides the scientific and legal basis for taking action under CERCLA and identifies contaminants and the exposure pathways that need to be addressed by the remedial action. See Mugdan Decl. ¶ 17.

15. The feasibility study (“FS”) portion of the RI/FS involves the identification and detailed evaluation of potential remedial alternatives. The alternatives are evaluated against the NCP evaluation criteria, and compared with each other to gauge their relative performance. Each

alternative that makes it to this stage of the analysis, with the exception of the required “No Action” alternative, should be protective of human health and the environment and compliant with Applicable or Relevant and Appropriate Requirements (unless a waiver is justified), both threshold requirements under CERCLA. EPA guidance also provides for a focused FS (or FFS) for an interim action that is more limited in scope than a site-wide remedy and only addresses areas/media that also will be addressed by a final site/operable unit Record of Decision. See Mugdan Decl. ¶ 18.

16. When the FS stage is complete, the lead agency identifies the Preferred Alternative for a site or operable unit and presents it to the public in a Proposed Plan. The Proposed Plan briefly summarizes the alternatives studied in the detailed analysis phase of the RI/FS, highlighting the key factors that led to identifying the Preferred Alternative. The Proposed Plan, as well as the RI/FS and the other information that forms the basis for the lead agency’s response selection, is made available for public comment in the Administrative Record file. The opportunity for a public meeting must also be provided at this stage. See Mugdan Decl. ¶ 19.

17. Following receipt of public comments and any final comments from the support agency, the lead agency selects and documents the remedy selection decision in a Record of Decision. The Record of Decision documents the remedial action plan for a site or operable unit and serves the following three basic functions: 1) it certifies that the remedy selection process was carried out in accordance with CERCLA and, to the extent practicable, with the NCP; 2) it describes the technical parameters of the remedy, specifying the methods selected to protect human health and the environment including treatment, engineering, and institutional control components, as well as cleanup levels; and 3) it provides the public with a consolidated summary

of information about the site and the chosen remedy, including the rationale behind the selection.

See Mugdan Decl. ¶ 20.

18. As described above, while the RI/FS for 17 Miles was underway, beginning in 2006 EPA undertook a targeted investigation, or FFS, of the Lower 8.3 Miles. The RI and FFS Reports for the Lower 8.3 Miles, and EPA's Proposed Plan for remediation of this portion of the Diamond Alkali Superfund Site were released to the public for comment on April 11, 2014 via the web site www.ourPassaic.org, a website hosted by EPA for the Lower Passaic River. These documents were also made available to the public in the Administrative Record file maintained at the Newark Public Library, 5 Washington Street, Newark, New Jersey, the Elizabeth Public Library, 11 South Broad Street, Elizabeth, New Jersey, and in the EPA Region 2 Records Center at 290 Broadway, New York City. A notice of availability of the Administrative Record was published in the Star Ledger and Luso Americano on April 25, 2014. EPA also developed fact sheets summarizing the Proposed Plan in Spanish and Portuguese to support its outreach to those communities. In addition, select documents from the Administrative Record were made accessible online at:

<http://www.ourPassaic.org>

<http://www.epa.gov/region02/superfund/npl/diamondalkali>

See Mugdan Decl. ¶ 21.

19. The public comment period for the Lower 8.3 Miles Proposed Plan and supporting documents was originally scheduled by EPA to extend from April 21, 2014 through June 20, 2014. EPA received requests to extend the public comment period, including from the CPG, to allow additional time for consideration of and comment on the Proposed Plan. In

response to these requests, EPA extended the public comment period to July 21, 2014, then to August 20, 2014, at which time the comment period closed. See Mugdan Decl. ¶ 22.

20. By the close of the comment period, EPA had received hundreds of comments, including comments from individuals, organizations, and elected officials. The CPG submitted 91 pages of detailed comments, accompanied by: eight appendices and 15 attachments comprising technical, legal and policy reports and analyses prepared for the CPG; 298 technical references; 87 items of correspondence; 45 documents referenced in Attachment A; 33 quality assurance plans; and 41 reports. In addition, William Hyatt of K&L Gates, LLP, on behalf of the CPG, submitted letters to EPA on May 27, 2014, June 30, 2014 and August 7, 2014 commenting on various aspects of the RI/FFS and EPA's Proposed Plan, which were included as comments to the Proposed Plan. Finally, individual members of the CPG submitted their own comment letters. In all, the CPG's comments comprised thousands of pages of material. See Mugdan Decl. ¶ 23.

21. Also during the public comment period, EPA held three public meetings to present the findings of the RI, the FFS and EPA's Proposed Plan. At these meetings, all of which were attended by representatives and members of the CPG, EPA personnel answered questions concerning the remedial alternatives developed as part of the FFS. Although not part of the formal public comment process, EPA also participated in a number of public forums, and attended several community meetings, to present information and answer questions about the RI/FFS and Proposed Plan. Representatives of the CPG also attended several of these meetings. See Mugdan Decl. ¶ 24.

22. Throughout the public comment period, EPA sent numerous news advisories by e-mail, listserv and regional social media accounts announcing the release of the Proposed Plan, reminding the public about EPA's public meetings and the public forums organized by other

entities, announcing the extension of the comment period, and reminding the public about the end of the comment period. Representatives and members of the CPG are included in the Region's listserv and e-mail groups. See Mugdan Decl. ¶ 25.

23. Subsequent to the close of the comment period, as required by the NCP, EPA prepared a detailed response to comments, including those submitted by the CPG. The CPG submitted four late comment letters after the close of the comment period, dated April 17, July 14, September 29 and December 29, 2015. Consistent with the NCP and EPA guidance, Region 2 reviewed the late comments to evaluate whether they substantially supported the need to significantly alter EPA's selected remedy, and found they did not. Therefore, the letters were included in the administrative record file as "Late Comments," but were not addressed in the detailed response to comments. See Mugdan Decl. ¶ 26.

24. On March 3, 2016, EPA signed the Record of Decision selecting the remedy for the sediments of the Lower 8.3 Miles. Responses to comments received by EPA at public meetings and in writing during the public comment period are included in the Responsiveness Summary, which is an Appendix to the Record of Decision. The Administrative Record for the Record of Decision, which contains approximately 580 documents (in addition to the documents submitted as public comments), is publically available online at: <https://semspub.epa.gov/src/collection/02/AR63167>. See Mugdan Decl. ¶ 27.

25. On March 31, 2016, after the issuance of the Record of Decision for the Lower 8.3 Miles of the Lower Passaic River part of the Diamond Alkali Superfund Site, EPA issued a notice letter to PRPs for the Lower Passaic River, advising of the actions that EPA will take to implement the remedy for the Lower 8.3 Miles. As described in the notice letter, the first action is to request the voluntary performance of the remedial design by one particular PRP (though

other PRPs may contribute to the funding). After execution of an agreement to perform the remedial design, EPA plans to begin negotiating a remedial action consent decree, under which a number of PRPs will implement and/or pay for the remedy for the Lower 8.3 Miles, and reimburse EPA's costs incurred for the Lower Passaic River. If EPA is unable to reach agreement on either (or both) the remedial design, or the remedial action, EPA will evaluate its enforcement options, including issuance of one or more unilateral orders and/or litigation in federal court. Members of the CPG, which consists of parties that EPA has identified as potentially responsible for releases of hazardous substances to the Lower Passaic River, will be among the PRPs that EPA will approach to implement and/or pay for the remedy for the Lower 8.3 Miles. See Mugdan Decl. ¶ 28.

26. The CPG continues to perform the 17 Miles RI/FS. When that work has been completed according to EPA's requirements, with the participation of NJDEP as support agency, EPA will prepare and issue a Proposed Plan for the full 17 Miles. After a public comment period, EPA will select a remedy for that portion of the Diamond Alkali Superfund Site, as well. See Mugdan Decl. ¶ 29.

III. Relevant Parties and Actions Taken for Lower Passaic River

27. *The Lower Passaic River Study Area Cooperating Parties Group ("CPG")*. The CPG is a group of PRPs identified for the Diamond Alkali Superfund Site (numbering over 70 in 2007, but currently at approximately 55). In 2004, EPA entered into an administrative settlement agreement pursuant to Section 122(h) of CERCLA with the companies that at the time, to EPA's knowledge, comprised the CPG. Pursuant to this agreement, the CPG was required to provide funds for EPA to perform an RI/FS for the 17 Miles. The agreement was amended twice to add

more parties to the CPG. EPA also understands that a number of former CPG members are no longer participating in the CPG. See Mugdan Decl. ¶ 30.

28. ***Partner Agencies.*** The Partner Agencies are a group of federal and state agencies studying the Lower Passaic River contemporaneously with EPA. The agencies include U.S. Army Corps of Engineers, New York District; New Jersey Department of Environmental Protection (“NJDEP”); National Oceanographic and Atmospheric Administration (“NOAA”); and U.S. Fish and Wildlife Service (“USFWS”). The New Jersey Department of Transportation (“NJDOT”) participated in the Partner Agencies until November 2007, when its responsibilities were transferred to NJDEP. See Mugdan Decl. ¶ 31.

29. Region 2 has a close relationship with NJDEP for the investigation and cleanup of the Diamond Alkali Superfund Site, including the Lower Passaic River, because under CERCLA, a state agency such as NJDEP is designated as EPA’s support agency. Section 121(f) of CERCLA provides for state involvement in the CERCLA process. The EPA must provide the state with an opportunity to comment on an RI/FS and all technical data leading to its issuance and the preferred remedial alternative identified through the RI/FS, among other issues. The NCP, implementing regulations for CERCLA, further provides for the role of the state. Under 40 CFR 300.515(f), the state has the opportunity to comment on the proposed plan for a site (or operable unit), and the EPA seeks the state’s concurrence on EPA’s final cleanup decision memorialized in the Record of Decision. See Mugdan Decl. ¶ 32.

30. In 2005, Region 2 signed a Joint Prosecution and Confidentiality Agreement (“JPCA”) with the Partner Agencies covering the work to be done at the Lower Passaic Site. This JPCA provided that the parties’ common interests with respect to the Passaic River Matter (defined as the contamination of the Passaic River and environs in New Jersey) include the

determination, implementation and supervision of appropriate and effective environmental and natural resource damages response actions, and the preparation for and prosecution of anticipated enforcement litigation against third parties with respect to the Passaic River Matter. The JPCA further provides that for the parties to pursue and achieve their common interests concerning environmental and natural resource damages response actions and anticipated enforcement litigation with respect to the Passaic River Matter, it has been and remains imperative, and in some instances is mandated by federal law, that the State of New Jersey and federal parties exchange communications, information and documents as part of their deliberative and decision-making processes. Subsequently, and throughout development of the 17 Miles RI/FS and the Lower 8.3 Mile RI/FFS, EPA has shared technical documents in draft form with the partner agencies (primarily NJDEP, but also the Corps-NY, NOAA, USFWS and NJDOT). See Mugdan Decl. ¶ 33.

31. *U.S. Army Corps of Engineers, Kansas City District (the “Corps-KC”) and Contractors.* When EPA begin the 17 Miles RI/FS, in or about 2002, EPA contracted with the Corps-KC to function as EPA’s lead contractor for the 17 Miles RI/FS under Interagency Agreement #DW9694197501. In 2006, when EPA began preparing the FFS to evaluate remedial alternatives for the Lower 8.3 Miles, the Corps-KC continued to function as EPA’s lead contractor for the RI/FFS under this contract. Under this contract, the Corps-KC was authorized to manage the work necessary to perform the sampling, analysis, and other technical work to develop the RI/FFS, and to support EPA’s preparation of the Proposed Plan and Record of Decision. Region 2 provided funds for this Interagency Agreement, and the Corps-KC subcontracted on EPA’s behalf with various contractors to perform much of the sampling, analysis, and technical work, which was provided to the Corps-KC and Region 2 for further

review and approval, and incorporation into the eventual RI/FFS, Proposed Plan and Record of Decision. Region 2 provided technical, legal and policy direction to the Corps-KC and, through the Corps-KC, its contractors. Region 2 set the schedule for the technical work. Region 2 reviewed, commented on, edited and approved all contractor work products. See Mugdan Decl. ¶ 34.

32. The Corps-KC hired contractors Malcolm Pirnie (later Louis Berger Group), HydroQual (later HDR/HydroQual) and Battelle to perform the technical work. See Mugdan Decl. ¶ 35.

33. At Region 2's and the Corps-KC's direction, Malcolm Pirnie/Louis Berger hired technical advisors as subcontractors to review draft analyses and interim products that were subsequently combined to form elements of the Lower 8.3 Miles RI/FFS. The technical advisors ensured that the highly technical analyses were performed correctly. See Mugdan Decl. ¶ 36.

34. Between 2007 and 2014, the CPG performed the sampling, modeling and analysis to complete the 17 Miles RI/FS that EPA had started, and that the CPG took over in 2007 pursuant to the 2007 AOC, as described above in Paragraph 9. To date, the CPG has submitted to EPA draft human health and ecological risk assessments, and draft RI and FS reports. See Mugdan Decl. ¶ 37.

35. From 2007 to 2009, the same team of contractors working with EPA Region 2/the Corps-KC to perform the FFS for the Lower 8.3 Miles also assisted EPA Region 2 in overseeing the CPG's work on the 17 Miles RI/FS, under a new Interagency Agreement, #DW9496212501. See Mugdan Decl. ¶ 38.

36. In 2009, for the 17 Miles RI/FS oversight, the Corps-KC, working with EPA Region 2, replaced Malcolm Pirnie/Louis Berger with CDM Federal Programs (CDM-Smith). See Mugdan Decl. ¶ 39.

37. Using funds provided by the CPG pursuant to the 2007 AOC, Region 2 funded the Interagency Agreement for the 17 Miles RI/FS oversight, which the Corps-KC used to hire the contractors. Region 2 also provided technical, legal and policy direction to the Corps-KC and, through the Corps-KC, its contractors. Region 2 set the schedule for the technical work. Region 2 reviewed, commented on, edited and approved all contractor work products incorporated into Region 2's oversight of the CPG 17 Miles RI/FS. See Mugdan Decl. ¶ 40.

38. ***EPA Contaminated Sediment Technical Advisory Group ("CSTAG")***. The CSTAG is an EPA-internal advisory group that advises EPA regional project managers on how to appropriately manage sediment sites in accordance with EPA guidance. The CSTAG's goals include encouraging national consistency in the management of sediment sites by providing a forum for exchange of technical and policy information, and providing a mechanism for monitoring and evaluating the progress at a number of the largest or most complex contaminated sediment sites. See Mugdan Decl. ¶ 41.

39. ***EPA National Remedy Review Board ("NRRB")***. EPA created the NRRB in January 1996 as part of a comprehensive package of reforms designed to make the Superfund program faster, fairer and more efficient. The NRRB is an EPA-internal peer review group that understands both the EPA regional and headquarters perspectives in the remedy selection process. It reviews proposed Superfund cleanup decisions for sites for which the proposed remedial actions cost more than \$25 million to make sure they are consistent with Superfund law, regulations and guidance. NRRB members are EPA managers and senior technical and

policy experts with significant experience in Superfund remedy selection issues. See Mugdan Decl. ¶ 42.

40. Due to the size and complexity of the Lower 8.3 Miles, Region 2 presented the proposed Superfund cleanup decisions for the Lower 8.3 Miles to both the CSTAG and the NRRB. The recommendations and comments of the CSTAG and the NRRB were incorporated into the eventual selected remedy and Record of Decision. See Mugdan Decl. ¶ 43.

41. In 2008, Region 2 presented Region 2's technical approach to studying the Lower 8.3 Miles to the CSTAG. See Mugdan Decl. ¶ 44.

42. On April 1, 2008, the CSTAG provided advice to Region 2 on the technical approach in the form of a comment memo. Region 2 responded to the CSTAG's comment memo on May 6, 2008. Both the CSTAG April 1, 2008 comment memo and Region 2's May 6, 2008 response are available to the public via the CSTAG web site. Based on the CSTAG's advice, Region 2 made changes to the work that the Corps-KC and its contractors were performing for Region 2, as part of EPA's development of the Lower 8.3 Miles RI/FFS. See Mugdan Decl. ¶ 45.

43. Throughout the development of the Lower 8.3 Miles RI/FFS, Region 2 updated the CSTAG on how the technical work was progressing. By phone and e-mail, members of the CSTAG served in an ongoing advisory role that led to ongoing changes and adjustments to the work that the Corps-KC and its contractors were performing for Region 2. See Mugdan Decl. ¶ 46.

44. Before Region 2 completed the Proposed Plan for the Lower 8.3 Miles and released it for public review, Region 2 submitted a technical memo to the NRRB for internal review. In December 2012, Region 2 made a presentation to the NRRB describing the alternative

that Region 2 expected to identify as the preferred alternative, and the basis for the Region's approach. CSTAG members also attended the meeting. See Mugdan Decl. ¶ 47.

45. The NRRB reviewed Region 2's description and basis for the likely preferred alternative. The NRRB, together with CSTAG, prepared a memorandum to document its evaluation and advisory recommendations, which Region 2 then referred to during its preparation of the documentation of the basis for choosing the preferred alternative. Drafts of the NRRB/CSTAG memorandum were shared with Region 2 for review. The drafts were generally provided between January 2013 and May 2013. The NRRB/CSTAG memorandum in its final form was dated April 11, 2014, and was released to the public as part of the Administrative Record for the Lower 8.3 Miles Proposed Plan. See Mugdan Decl. ¶ 48.

46. As part of the NRRB review process, Region 2 responded to NRRB/CSTAG memorandum in a written response. Region 2's response was shared in draft form with members of NRRB in January through March 2014. Both the NRRB/CSTAG April 11, 2014 memorandum and Region 2's April 11, 2014 response, in final form, were released to the public as part of the Administrative Record for the selection of the remedy for the Lower 8.3 Miles. See Mugdan Decl. ¶ 49.

47. Based on the NRRB/CSTAG advice, provided in the various drafts of the memorandum, Region 2 made changes to the Lower 8.3 Miles Proposed Plan and directed the Corps-KC and its contractors to make changes to the Lower 8.3 Miles RI/FFS. See Mugdan Decl. ¶ 50.

48. In addition to NRRB review, in late 2013 and early 2014, Region 2 provided drafts of the Lower 8.3 Miles Proposed Plan to EPA Office of Solid Waste and Emergency Response, Office of Superfund Remediation and Technology Innovation ("OSWER-OSRTI") for

its review. The name of the Office of Solid Waste and Emergency Management (“OSWER”) has now been changed to the Office of Land and Emergency Management (“OLEM”). See Mugdan Decl. ¶ 51 & n.1.

49. In late 2013 and early 2014, EPA OSWER-OSRTI provided comments intended to review Region 2’s basis and explanation for selection of the preferred alternative; to evaluate conformance with EPA policies and guidance; and, where the Region had determined that an aspect of EPA guidance would not apply, to understand the basis for that determination. See Mugdan Decl. ¶ 52.

50. Based on EPA OSWER-OSRTI comments and review, Region 2 made changes to the Lower 8.3 Miles Proposed Plan. These changes were incorporated into the final version of the Lower 8.3 Mile Proposed Plan, which was released to the public in April 2014. However, unlike the NRRB review, there was no final memorandum documenting EPA OSWER-OSRTI comments. See Mugdan Decl. ¶ 53.

51. ***Proposed Plan Public Comment Period.*** As described above in Paragraph 21, EPA issued the Lower 8.3 Miles Proposed Plan as part of its public participation responsibilities under Section 117(a) of CERCLA and Section 300.430(f)(2) of the NCP. The nature and extent of the contamination in the Lower 8.3 Miles and the remedial alternatives summarized in the Lower 8.3 Miles Proposed Plan are described in detail in EPA’s Lower 8.3 Miles RI/FFS, and numerous, detailed supporting appendices. A copy of the Lower 8.3 Miles Proposed Plan, Lower 8.3 Miles RI/FFS reports and other documents comprising the administrative record file were made available to the public in the information repositories located at the Newark and Elizabeth Public Libraries and the EPA Region 2 Superfund Records Center. Public notices

about the release of the Proposed Plan were published in two local newspapers. See Mugdan Decl. ¶ 54.

IV. CPG's FOIA Requests

52. Shortly after the issuance of the Proposed Plan, the CPG submitted four FOIA requests to Region 2, seeking substantial amounts of information (collectively, the "CPG FOIA Requests"). Specifically, on April 21, 2014, on behalf of the CPG, Robert La Gravenis of K&L Gates, LLP, submitted FOIA request EPA-R2-2014-005768 (the "CPG's First FOIA Request"). On April 28, 2014, on behalf of the CPG, Mr. La Gravenis submitted FOIA request EPA-R2-2014-006018 (the "CPG's Second FOIA Request"). On May 14, 2014, on behalf of the CPG, Mr. La Gravenis, submitted FOIA request EPA-R2-2014-006476 (the "CPG's Third FOIA Request"). Finally, on June 17, 2014, on behalf of the CPG, submitted FOIA request EPA-R2-2014-007546 (the "CPG's Fourth FOIA Request"). See Mugdan Decl. ¶ 55, Exs. A, B, C, D.

53. The CPG's first three FOIA Requests were interrelated, and therefore Region 2 responded to the requests in a consolidated and coordinated manner. The CPG's first three FOIA requests were also very broad and required Region 2 staff to collect and review over 66,000 documents as part of the coordinated response. Ultimately, Region 2 expended 298 hours on the CPG FOIA requests. Throughout the time that Region 2 staff worked on these requests, they remained in communication with the CPG to advise it of the schedule and progress, and ask questions as needed. When possible, Region 2 released information to the CPG on a rolling basis. See Mugdan Decl. ¶ 56.

54. All four CPG FOIA Requests were assigned to Alice Yeh, Remedial Project Manager for the Lower 8.3 Miles. Alice Yeh met with Assistant Region Counsels Sarah Flanagan and Patricia Hick to plan and manage the search, collection and review of responsive

information. Between April 30, 2014 and February 19, 2015, Alice Yeh, Sarah Flanagan and Patricia Hick met fourteen times to discuss the steps taken and progress made on the CPG FOIA requests. See Mugdan Decl. ¶ 57.

55. Alice Yeh called Mr. La Gravenis on May 9, 2014 to seek the CPG's agreement to pay the estimated costs of responding to the CPG's First FOIA Request (EPA-R2-2014-005768) and the CPG's Second FOIA Request (EPA-R2-2014-006018), and on May 20, 2014 to seek the CPG's agreement to pay the estimated cost of responding to the CPG's Third FOIA Request (EPA-R2-2014-006476). On May 9 and 20, Alice Yeh also wrote e-mails to Mr. La Gravenis to confirm their telephone discussions. Mr. La Gravenis advised by email dated May 14, 2014 that the CPG would reserve its rights with respect to payment of the FOIA costs. Sarah Flanagan emailed Karyllan Mack of K&L Gates on May 16, 2014 to seek clarification regarding the CPG's willingness to pay the costs of the FOIA responses, and to provide information about the status of Region 2's response to the CPG's First, Second and Third FOIA Requests. On May 16, 2014, Ms. Mack of K&L Gates responded to Sarah Flanagan's May 16, 2014 email, agreeing to pay the cost of responding to the request and withdrawing sub-request #13. Sarah Flanagan also wrote to William H. Hyatt of K&L Gates by letters dated June 19, 2014 and November 13, 2014 to inform him of the status of Region 2's response to the CPG FOIA Requests. See Mugdan Decl. ¶ 58, Exs. E, F, G.

V. CPG's First FOIA Request: EPA-R2-2014-005768

56. The CPG's First FOIA request contained 14 sub-requests for documents:

- Sub-request #1 asked for an Access or Excel file containing each normalized tissue and sediment concentration data pair (with units, basis and data qualifiers) used to generate a regression model, Biota-Sediment Accumulation Factor (BSAF) curve or Biota Accumulation Factor (BAF) curve presented in Final FFS Appendix A, Data Evaluation Report 6 (Biota Analysis). The sub-request indicated that the Access or Excel file should

identify, for each biota tissue sample location, all tissue and sediment sample IDs used to generate the normalized tissue and sediment concentration data pair for that location.

- Sub-request #2 asked for a flat file dataset in Access or CSV including at least the following fields for each sample that was used to generate the normalized tissue and sediment concentration data pairs that were used to generate a regression model, BSAF curve or BAF curve presented in Final FFS Appendix A, Data Evaluation Report 6 (Biota Analysis): source; study; location; coordinates; river mile (if appropriate); species and tissue type (for each tissue sample); sample depth (for each sediment sample); sample ID; sample type (e.g., field duplicate); analyte name, including all contaminants, lipid, TOC and iron; numeric concentration for each analyte, including numeric concentrations for each sum component (e.g., for Polycyclic Aromatic Hydrocarbon (PAH) mixtures) and calculated totals; data qualifiers; Units; and basis (e.g., dry weight).
- Sub-request # 3 asked for data files, including database query output (e.g., sample ID, analytical results, and qualifiers) and ProUCL input file, for tissue samples included in current baseline Human Health Risk Assessment (HHRA) fish and crab tissue Exposure Point Calculations (EPC).
- Sub-request #4 asked for technical bases (analyses, calculations, model files and results, and any other relevant materials) for EPA's sliding scale of annual averages based on receptor exposure duration (used to estimate future concentrations).
- Sub-request #5 asked for technical back-up/documentation for EPA's analysis of 2000 US Census data for Essex and Hudson counties (used to estimate residence time).
- Sub-request #6 asked for technical back-up/documentation for EPA's re-analysis of Joanna Burger's 1999 survey of Newark Bay anglers (used to estimate fish and crab consumption rates).
- Sub-request #7 asked for any correspondence between Region 2 and NJDEP on NJDEP angler surveys that included sites on the LPR, and any data and analysis from those surveys.
- Sub-request #8 asked for any correspondence between the Region and the National Remedy Review Board (NRRB) since the group's comments were submitted in Nov. 2012 and issuance of the NRRB/Contaminated Sediments Technical Advisory Group (CSTAG) final comments on April 11, 2014.
- Sub-request #9 asked for any correspondence between Region 2 and HQ on draft versions of the Proposed Remedial Action Plan (PRAP) and Focused Feasibility Study (FFS) documents.

- Sub-request #10 asked for technical bases (analyses, calculations, modelling files and results, mapping, and any other relevant materials) used to develop the capping area footprints for Alternative 4.
- Sub-request #11 asked for technical backup/documentation for all unit or rollup cost items greater than \$5,000 that cite to an "Internal Database" cited in FFS Appendix H.
- Sub-request #12 asked for The Louis Berger Group, Inc., 2007. "Staging and Processing Areas, Treatment Technologies, and Transportation Logistics Review." Lower Passaic River Contract. Prepared for the NJDEP. April 2007.
- After further consultation and communication with Region 2 on the scope of sub-request #13, the requester withdrew sub-request #13.
- Sub-request #14 asked for the data set used to develop EPCs used in the Ecological Risk assessment and shown in Table 7-6 of the FFS RI. This would include EPCs for sediment, the tissue concentrations for the 'generic fish', biota tissue for mummichog, and crab EPCs.

See Mugdan Decl. ¶ 59.

EPA's Search and Response

57. *Initial Response.* On April 28, 2014, Region 2 assigned the First FOIA Request to Alice Yeh. On May 9, 2014, Alice Yeh called and sent an email to Mr. La Gravenis providing him with an estimate of the costs of responding to the request, seeking an assurance of payment for the costs of responding to the request, informing him that responding to the request would exceed the statutory deadline (because of the breadth of the request), and asking him to clarify sub-request #13. See Mugdan Decl. ¶ 60, Ex. E.

58. After receiving the CPG's First FOIA Request, on April 30, 2014, Region 2 staff met to discuss how to interpret the 14-part FOIA request, identify relevant individuals throughout Region 2 who might have potentially responsive documents, develop instructions for conducting the search, and discuss responsive documents that could be released in the first installment. Ten of the 14 meetings described above included discussion of the steps taken and progress made on this FOIA request. See Mugdan Decl. ¶¶ 58, 61.

59. *Clarifying and Narrowing the CPG's First FOIA Request.* On May 22, 2014, following the exchanges described above, Alice Yeh sent a letter to Mr. La Gravenis estimating that it would take until the end of July 2014 to respond to the CPG's First FOIA Request and giving him the opportunity to modify the request so that Region 2 could process the request within a shorter timeframe. The letter also provided the first installment of documents responsive to four sub-requests and directed Mr. La Gravenis to specific locations on the OurPassaic.org website and portions of the Lower 8.3 Miles RI/FFS with information responsive to another four sub-requests in the FOIA request. See Mugdan Decl. ¶¶ 58, 62, 74, Ex. H.

EPA's Search for Responsive Records

60. On May 9, 2014, Alice Yeh spoke to several employees of the Louis Berger Group and Battelle asking for assistance in locating materials submitted to EPA that might be responsive to the FOIA request. In particular, Ms. Yeh requested that the Louis Berger Group assist her in identifying documents or information in EPA's possession that the Louis Berger Group had submitted to EPA that might be responsive to the sub-requests for technical data and information (sub-requests #1, 2, 3, 4, 5, 6, 10, 11, 12, and 14). These documents were located and EPA either provided them to CPG, or directed the CPG to the locations that they had been made available to the public. See Mugdan Decl. ¶¶ 63, 76.

61. In addition to the documents that originated with the Louis Berger Group, Region 2 staff determined that responsive information to the CPG FOIA Requests would likely be located in EPA staff email accounts (both Lotus Notes and Outlook), or as electronic or paper documents in the possession of Region 2 staff. Therefore, on May 19, 2014, Region 2 staff met to discuss use of the agency's eDiscovery collection software to search the email accounts of specified document custodians using search terms and defined search parameters. Due to the size

and complexity of sub-requests #8 and #9, Region 2 determined that EPA's Encase eDiscovery tool should be used for collection of email documents, and that the collected documents should be reviewed using the Agency's Relativity review software. Alice Yeh, Sarah Flanagan and Patricia Hick determined that Region 2 employees (both current and retired) from ERRD, Office of Regional Counsel and Office of the Regional Administrator might be custodians of e-mails responsive to sub-requests #8 and #9, and identified a date range for the search of November 21, 2012 to April 11, 2014. The custodians and search queries were entered into an Excel spreadsheet formatted to allow the Region 2 Encase coordinator, Judy Rubin, to perform the search. The ERRD staff person identified by Alice Yeh as the potential custodian of records responsive to sub-requests #6 and #7 was contacted directly by Alice Yeh and searched her electronic and paper documents for responsive information. Information responsive to #12 was located in EPA's files by Alice Yeh. See Mugdan Decl. ¶ 64.

EPA's Collection of Responsive Records

62. From approximately 2001 to early 2013, EPA, including Region 2, used Lotus Notes for Agency email. From 2013 to the present, EPA has used Microsoft Outlook email housed in the Agency's O365 cloud service. In order to collect responsive email records, Region 2 used the Encase eDiscovery search tool to search both the archival Lotus Notes email accounts and current Outlook email accounts of ERRD, Office of Regional Counsel and Office of the Regional Administrator personnel (both current and retired), as discussed above. See Mugdan Decl. ¶ 65.

63. To respond to sub-request #8 of the First FOIA Request (for correspondence between Region 2 and the CSTAG/NRRB), Region 2 identified nine EPA custodians consisting of EPA Region 2 legal and technical staff, and 10 likely correspondents who were members of

the NRRB and the CSTAG. Region 2 then searched for any email correspondence in the accounts of the nine Region 2 custodians which was sent to or from a member of the CSTAG/NRRB in the time frame of November 12, 2012 to April 11, 2014. No additional search terms or filters were used. To respond to sub-request #9 of the First FOIA Request (for correspondence between Region 2 and EPA HQ on the Proposed Remedial Action Plan and Focused Feasibility Study), Region 2 identified 12 EPA custodians consisting of EPA Region 2 technical and legal staff, and 32 likely correspondents consisting of EPA HQ staff, including senior managers, technical staff, and legal staff in the Office of the Administrator, the Office of Solid Waste and Emergency Management (OSWER, now the Office of Land and Emergency Management), the Office of General Counsel, and the Office of Enforcement and Compliance Assurance. Region 2 then searched for any email correspondence in the accounts of the 12 identified custodians which was sent to or from any of the 32 identified HQ staff in the time frame of September 12, 2013 to April 11, 2014. No additional search terms or filters were used. See Mugdan Decl. ¶ 66.

64. On June 18, 2014, a collection of documents within Relativity named “ED_000018 – Diamond Alkali, Passaic River Focused” was created to facilitate the review and processing of potentially responsive information to all of the CPG FOIA requests. EPA Region 2 created a sub-folder within the Relativity collection to house documents responsive to the CPG’s First FOIA Request. Email documents from the Encase automated search of Lotus Notes and Outlook were loaded into the folder on June 24, 2014. After the initial creation of the folder with materials from Lotus Notes and Outlook, additional materials from paper and electronic file searches were also loaded into Relativity. In that way, Region 2 staff determined that all locations reasonably likely to have responsive information had been searched. The final folder

contained 42,662 documents that were potentially responsive to the CPG's First FOIA Request. See Mugdan Decl. ¶ 67.

65. Between July 24 and September 26, 2014, as processing and review was ongoing, Alice Yeh sent Mr. La Gravenis several emails revising the estimated completion date for the FOIA request. Alice Yeh's final email on September 26, 2014 revised the completion date estimate to October 3, 2014. See Mugdan Decl. ¶ 68, Ex. I.

EPA's Processing of Responsive Records

66. Region 2 processed the documents responsive to the CPG's First FOIA Request electronically, using the Relativity software as a platform to perform a line-by-line review of each record and mark whether a record was to be released, partially redacted, or fully withheld. Staff also documented in the Relativity database the FOIA exemption(s) asserted for each withheld record. Relativity assigned each record a reference number and staff then prepared an index of the documents marked to be withheld in the database to provide the CPG with EPA Region 2's final production. See Mugdan Decl. ¶ 69.

67. The steps for retrieving and processing the records in this FOIA response were as follows. First, Region 2 staff reviewed potentially responsive records in the database and categorized the records as not responsive (either because the record was not responsive or duplicative), release in full, withhold in full under a FOIA exemption, or release with redaction under a FOIA exemption. This step allowed the database to: (1) track the number of records for each asserted FOIA exemption; (2) retrieve remaining unprocessed records; or (3) identify records requiring verification that exemptions were properly asserted. Second, Region 2 staff produced records to the CPG. Third, Region 2 staff generated an index of the documents marked to be withheld. See Mugdan Decl. ¶ 70.

68. *Segregating Non-Exempt Material.* Region 2 staff also conducted a line-by-line review of each record responsive to the CPG's First FOIA Request for segregability of non-exempt material. Region 2 staff determined that where a record was withheld in full, no meaningful portion could reasonably be released. Region 2 staff performed redactions where non-exempt material could be reasonably segregated and released non-exempt portions. See Mugdan Decl. ¶ 71.

69. In addition, after commencement of litigation, EPA's Office of General Counsel re-reviewed the withheld documents. On May 11, 2016, 51 documents that were previously withheld in full in response to CPG's First Request were released in full and 28 documents were released with redactions. See Mugdan Decl. ¶ 72, Ex. J.

EPA's Production of Responsive Records

70. *Initial Production of Records.* Region 2 staff uploaded the first installment of responsive records to the CPG on May 22, 2014. This installment consisted of documents responsive to sub-requests #5, #6, #7 and #12, and direction to specific locations in Lower 8.3 Miles RI/FFS files publicly available on EPA's website, ourPassaic.org, which contained information responsive to sub-requests #3, #4, #10 and #14. The first installment (10 files) was produced electronically via FOIAOnline on May 27, 2014. On June 17, 2014, and September 19, 2014, Mr. Hyatt of K& L Gates wrote to Sarah Flanagan regarding the initial production of records responsive to CPG's First FOIA Request, among other issues. See Mugdan Decl. ¶ 73, Exs. H, K, L.

71. *Second Production.* Region 2 staff uploaded a second installment of responsive records on October 2, 2014. This installment consisted of (460 files). The second installment was produced electronically via FOIAOnline on October 3, 2014. See Mugdan Decl. ¶ 74.

72. On October 29, 2014, EPA Region 2 uploaded a final letter to FOIAonline, withholding certain responsive records, and completing the response. Region 2 sent an invoice to the CPG through FOIAOnline. See Mugdan Decl. ¶ 75, Ex. M.

73. The CPG's First FOIA Request sought 13 categories of information (one of the original 14 having been withdrawn by the CPG), and Region 2 responded by releasing documents through FOIAOnline as follows:

- In response to sub-requests #1-2, seeking database files with numerous specific elements, Region 2 released one document, the file "BSAF Tissue Sediment Data." This is an Excel spreadsheet that includes some, though not all, of the elements identified in the CPG's First FOIA Request. The data elements that were not included simply were not part of the spreadsheet as maintained by EPA.
- In response to sub-request #3, seeking data files for tissue samples included in baseline Human Health Risk Assessment (HHRA) fish and crab tissue Exposure Point Calculations (EPC), Alice Yeh stated in her May 22, 2014 letter accompanying the first release of information that the data files requested were posted in the Digital Library on ourPassaic.org under "Passaic River/Newark Bay Datasets" and the sample identification numbers and associated information needed to recreate the ProUCL input files were provided in Attachment 1 of Appendix D of the RI/FFS (which was and is publicly available on the website hosted by EPA for the Lower Passaic River, ourpassaic.org).
- Similarly, for sub-request #4, seeking technical bases for EPA's sliding scale of annual averages based on receptor exposure duration (used to estimate future concentrations), Alice Yeh's May 22, 2014 letter stated that the technical basis was provided in Table 5-2 and associated text in Appendix D of the RI/FFS, and that EPA had already provided the model files and results to the CPG in March 2014.
- For sub-request #5, seeking technical back-up/documentation for EPA's analysis of 2000 US Census data for Essex and Hudson counties (used to estimate residence time); Region 2 released one document, "Revised Tech Memo 1 – HH exposure".
- For sub-request #6, seeking technical back-up/documentation for EPA's re-analysis of Joanna Burger's 1999 survey of Newark Bay anglers (used to estimate fish and crab consumption rates), Region 2 released 10 documents.
- In response to the sub-request #7, seeking correspondence between Region 2 and NJDEP on NJDEP angler surveys that included sites on the LPR, and data and analysis on those surveys, Region 2 released 37 documents, and withheld 12 documents. (Region 2 identified 15 documents on its withholding log that accompanied the final production but has determined that three of the documents were released.)

- In response to sub-requests #8 and #9, seeking correspondence between Region 2 and NRRB since the group's comments were submitted in November 2012 and until issuance of the NRRB/CSTAG final comments on April 11, 2014, and between Region 2 and HQ on draft versions of the Proposed Plan and FFS documents, Region 2 released over 400 documents through FOIAOnline. Region 2 withheld 571 documents, citing FOIA Exemption 5.
- In response to sub-request #10, seeking technical bases used to develop the capping area footprints for Alternative 4 in the Proposed Plan, Region 2 responded via Alice Yeh's May 22, 2014 letter informing the CPG that the technical basis was provided in Appendix B of the RI/FFS, and that EPA had already provided the modeling files and results to the CPG in March 2014.
- In response to sub-request #11, seeking technical backup/documentation for all unit or rollup cost items over \$5,000 that cite to "Internal Database" in FFS Appendix H, Region 2 provided one document, "FFS Appendix H Cost Estimate References."
- In response to sub-request #12, seeking a document prepared by the Louis Berger Group, Inc. in 2007, "Staging and Processing Areas, Treatment Technologies, and Transportation Logistics Review" Region 2 provided the document.
- In response to sub-request #14, seeking the data set used to develop EPCs used in the Ecological Risk Assessment and shown in Table 7-6 of the FFS RI, Region 2 responded by informing the CPG in Alice Yeh's May 22, 2014 letter that the data files requested are posted in the Digital Library on ourPassaic.org, under "Passaic River/Newark Bay Datasets" and sample identification numbers and associated information needed to recreate the ProUCL input files are provided in Attachment 1 of Appendix D of the RI/FFS.

See Mugdan Decl. ¶ 76 & n.2, Exs. H, X.

74. *Production Numbers.* EPA Region 2 identified approximately 42,662 records as potentially responsive to the CPG's First FOIA Request, of which Region 2 released 443 documents in full, released 27 documents with redactions, and withheld 586 documents in full. The remaining documents were determined to be duplicative or otherwise non-responsive to the CPG's First FOIA Request. In addition, on May 11, 2016, 51 documents that were previously withheld in full in response to CPG's First Request were released in full and 28 documents were released with redactions following OGC review. The final number of responsive documents to

CPG's First FOIA Request was approximately 1,053 records, with approximately 494 released in full, approximately 55 released with redactions, and 504 withheld in full under one or more exemptions. The Coded Vaughn Index does not include the 27 documents released with redactions in the initial response. These documents were provided to CPG with the redaction on the face of the document. See Mugdan Decl. ¶ 77 & n.3, Ex. X.

VI. CPG's Second FOIA Request: EPA-R2-2014-006018

75. The CPG's Second FOIA Request did not have multiple sub-parts, but rather consisted of a very broad request for all emails, correspondence and other documents relating to: EPA's 2008 Conceptual Site Model ("CSM") and Empirical Mass Balance Model ("EMBM") developed as part of the Lower 8.3 Miles RI/FFS and any comments, revisions or changes to the CSM that were considered by EPA in the development and issuance of the Proposed Plan for the Lower 8 Miles; and EPA's June 2008 peer review of the CSM and EMBM. See Mugdan Decl. ¶ 78.

EPA's Search and Response

76. On April 29, 2014, Region 2 assigned the request to Alice Yeh. On May 9, 2014, Alice Yeh called and sent an email to Mr. La Gravenis providing him with an estimate of the costs of responding to the request, seeking an assurance of payment for the costs of responding to the request, and informing him that responding to the request would exceed the statutory deadline (because of the breadth of the request) and that until the requestor agreed to pay the costs of production, production would be on hold. See Mugdan Decl. ¶ 79, Ex. E.

77. After receiving the CPG's Second FOIA Request, Region 2 staff met on April 30 to discuss how to interpret the FOIA request, identify relevant individuals throughout Region 2 who might have potentially responsive documents, develop instructions for conducting the

search, and discuss responsive documents that could be sent in the first installment. The response to the Second FOIA Request was then incorporated into the effort to respond to the First FOIA Request, and included in the meetings discussed above. See Mugdan Decl. ¶¶ 58, 80.

78. On May 14, 2014, Mr. La Gravenis sent an email responding to Alice Yeh's May 9, 2014 email indicating that the CPG would agree to pay the costs for responding to the request, but would reserve its rights with respect to such costs. On May 16, 2014, Sarah Flanagan of Region 2 sent an email to Karyllan Dodson Mack of K&L Gates requesting that K&L Gates confirm the CPG agreement to pay costs of responding to the FOIA request. Sarah Flanagan's email also summarized the status of the request. On May 16, 2014, Ms. Mack of K&L Gates responded to Sarah Flanagan's May 16, 2014 email agreeing that the CPG would pay the cost of responding to the request. See Mugdan Decl. ¶ 81, Ex. E.

79. In her letter dated May 22, 2014 accompanying the first release of information, Alice Yeh estimated that it would take EPA until the end of September 2014 to complete its response to the CPG's Second FOIA Request and gave him the opportunity to modify the request so that EPA Region 2 could process the request within a shorter timeframe. In an email dated September 26, 2014, Alice Yeh extended her estimate of the time for response until the end of October 2014. See Mugdan Decl. ¶ 82, Exs. N, O.

80. By letter dated November 4, 2014, Mr. Hyatt of K&L Gates inquired whether the Region would be able to complete its response by the end of November 2014. By letter dated November 13, 2014, Sarah Flanagan replied, stating that it was Region 2's intention to complete its review by the end of November 2014, and informing the CPG that the request required the Region to review close to 10,000 documents. See Mugdan Decl. ¶ 83, Exs. G, P.

EPA's Search for Responsive Records

81. Region 2 staff determined that, due to the number of records likely to be responsive to this request, EPA's Encase eDiscovery tool should be used for collection of email documents, and that the collected documents should be reviewed using EPA's Relativity review software. See Mugdan Decl. ¶ 84.

82. Alice Yeh, Sarah Flanagan and Patricia Hick determined that seven EPA Region 2 employees from ERRD and the Office of Regional Counsel and an EPA Headquarters employee located in Region 2's Edison office might be custodians of e-mails responsive to this FOIA request. The date range for the search was March 31, 2006 to February 10, 2014. The search terms used for all identified custodians for the Second FOIA Request were CSM, EMBM, and DER (whole word), in addition to two complex index queries, "Conceptual AND Site AND Model" and "mass AND balance." Finally, Alice Yeh's email was searched for the index query "Appendix AND (A OR C)" in addition to the search terms described above due to her involvement in the development of these appendices, which describe the CSM and EMBM. The custodians and search terms were entered into an Excel spreadsheet formatted to allow the Region 2 Encase coordinator, Judy Rubin, to perform the search. In addition, the Region 2 staff identified by Alice Yeh as potential custodians of non-email records potentially responsive to this request were contacted directly by Alice Yeh and at her request, the potential custodians searched their working files and notes for responsive documents. See Mugdan Decl. ¶ 85.

EPA's Collection of Responsive Records

83. On June 18, 2014, Relativity Collection "ED_000018 – Diamond Alkali, Passaic River Focused" was created. EPA Region 2 created a folder with documents responsive to the CPG's Second FOIA Request on July 10, 2014. The final folder in Relativity contained 13,510 documents that were potentially responsive to the CPG's Second FOIA Request. An additional

220 files from Region 2 staff's search of paper and electronic files were saved to a designated drive on Region 2's computer network for review, but were not added to the Relativity workspace. In this way, Region 2 staff determined that all locations reasonably likely to have records responsive to the CPG's Second FOIA Request had been searched. See Mugdan Decl. ¶ 86.

EPA's Processing of Responsive Records

84. Region 2 processed the documents responsive to the CPG's Second FOIA Request electronically, which involved the use of Relativity to enter records into a database and determine whether a record was released, partially redacted, or fully withheld. Staff also documented in the database the FOIA exemption(s) asserted for each withheld record. Relativity assigned each record a reference number and staff then prepared an index of the documents marked to be withheld in the database to provide to the FOIA requester with EPA Region 2's final production. See Mugdan Decl. ¶ 87.

85. The steps for retrieving and processing the records in this FOIA response include review, categorization, and processing steps following the procedure as described in Paragraph 72 for the records collected in the Relativity workspace. In addition, the documents collected by Region 2 staff through review of their working files and notes were reviewed by Alice Yeh, Patricia Hick and Sarah Flanagan, who identified whether the documents should be released, withheld in full under a FOIA exemption, or withheld in part under a FOIA exemption. These documents were added manually to the index that was provided to the CPG. See Mugdan Decl. ¶ 88.

86. *Segregating Non-Exempt Material.* Region 2 staff also conducted a line-by-line review of each record responsive to the CPG's First FOIA Request for segregability of non-

exempt material. Region 2 staff determined that where a record was withheld in full, no meaningful portion could reasonably be released. Region 2 staff performed redactions where non-exempt material could be reasonably segregated and released non-exempt portions. See Mugdan Decl. ¶ 89.

87. In addition, after commencement of litigation, EPA's Office of General Counsel re-reviewed the withheld documents. On May 11, 2016, 51 documents that were previously withheld in full in response to CPG's Second Request were released in full and 63 documents were released with redactions. See Mugdan Decl. ¶ 90, Ex. J.

EPA's Production of Responsive Records

88. EPA Region 2 uploaded the first installment of records responsive to the CPG's Second FOIA Request on May 22, 2014. The first installment was produced electronically via FOIAOnline on May 27, 2014. See Mugdan Decl. ¶ 91, Ex. N.

89. Region 2 released interim responses through FOIAOnline on May 27, 2014 (37 files), October 20, 2014 (446 files), November 25, 2014 (205 files) and December 16, 2014 (3 files). See Mugdan Decl. ¶ 92.

90. On January 7, 2015, Region 2 uploaded a final letter to FOIAonline withholding certain responsive information and completing the response. Region 2 also uploaded an invoice to FOIAOnline. See Mugdan Decl. ¶ 93, Ex. Q.

91. *Production Numbers.* EPA Region 2 identified approximately 13,800 records as potentially responsive to the CPG's Second FOIA Request, of which Region 2 released 662 documents in full and 29 documents with redactions, and withheld 1,799 files in full. The remaining documents were determined to be duplicative or otherwise non-responsive to the CPG's Second FOIA Request. The Coded Vaughn Index does not include the 29 documents

released with redactions in the initial response. These documents were provided to CPG with the redaction on the face of the document. In addition, on May 11, 2016, 51 documents that were previously withheld in full in response to CPG's Second FOIA Request were released in full and 64 documents were released with redactions following OGC review. See Mugdan Decl. ¶ 94 & n. 4, Ex. X.

92. The final number of responsive documents to CPG's Second FOIA Request was approximately 2,492 records, with approximately 713 released in full, approximately 93 released with redactions, and approximately 1686 withheld in full under one or more exemptions. See Mugdan Decl. ¶ 95, Ex. X.

VII. CPG's Third FOIA Request: EPA-R2-2014-006476

93. The CPG's Third FOIA Request sought seven categories of information (the seventh category was added on May 16, 2014, as discussed below):

- Sub-request #1 sought an accounting of funds spent and/or committed to be spent in developing the April 11, 2014 Proposed Plan (PP) for the Lower 8 Miles of the Lower Passaic River Study Area (LPRSA) and the reports and appendices thereto, including but not limited to the Remedial Investigation (RI) and Focused Feasibility Study (FFS).
- Sub-request #2 sought any authorization for expenditure of funds for the PP and the reports and appendices thereto.
- Sub-request #3 sought all comments to the National Remedy Review Board (NRRB) from the partner agencies (NOAA, FWS, and State of NJ) sent to EPA for transmittal to the NRRB and any EPA responses to such comments.
- Sub-request #4 sought any and all communications regarding the LPRSA between: 1) Any U.S. EPA personnel and any member of the Community Advisory Group or any other person purporting to be a representative of the community; and 2) any member of the public and Judith Enck, including any alter egos or aliases of Administrator Enck. This information would include but not be limited to all letters, email (both official accounts and personal accounts used for official business), and any notes, records, reports, summaries or memoranda taken during or prepared after communications with members of the public relating to the LPRSA.

- Sub-request #5 sought the following items related to the public hearing on the Proposed Plan, held by EPA in Newark, NJ on May 7, 2014 (Hearing): 1) video and/or other recordings taken during the Hearing; 2) a transcript of the Hearing; 3) sign-in sheets for participants at the Hearing; 4) communications between Region 2 and members of the public regarding preparations for the Hearing (to the extent not covered by request 4); and 5) any petitions available for signature during the Hearing.
- Sub-request #6 sought any documents relating to the designation of any portion of the Diamond Alkali Superfund Site as an operable unit.
- Sub-request #7 sought the sample identification numbers and chemistry for the four core samples, four grab samples and two dam catchment samples that EPA used to define upriver (above the Dundee Dam) surface sediment background conditions.

See Mugdan Decl. ¶¶ 96, 100, Ex. C.

EPA's Search and Response

94. *Initial Response.* On May 19, 2014, EPA Region 2 assigned the CPG's Third FOIA Request to Alice Yeh. See Mugdan Decl. ¶ 97.

95. After receiving the CPG's Third FOIA Request, Region 2 staff met on May 20, 2014 to discuss how to interpret the 7-part FOIA request, identify relevant individuals throughout Region 2 who might have potentially responsive documents, develop instructions for conducting the search, and discuss responsive documents that could be released in first installment. The response to the Third FOIA Request was then incorporated into the effort to respond to the First and Second FOIA Requests, and included in 13 of the 14 the meetings discussed above. See Mugdan Decl. ¶¶ 58, 95.

96. On May 16, 2014, Sarah Flanagan of Region 2 sent an email to Karyllan Dodson Mack of K&L Gates noting that EPA was reviewing the level of effort that would be required for the response to the CPG's Third FOIA Request and would prepare an estimate and determine whether the fee limit included in the request would be sufficient. On May 16, 2014, Ms. Mack of

K&L Gates responded to Sarah Flanagan's May 16, 2014 e-mail advising that, on May 15, 2014, she had submitted an amendment to the CPG's Third FOIA Request that added a new sub-request #7. See Mugdan Decl. ¶ 99, Ex. E.

97. *Clarifying and Narrowing the Request.* On May 20, 2014, Alice Yeh spoke to Mr. La Gravenis about the request. Alice Yeh provided Mr. La Gravenis with an estimate of the cost of responding to the request and estimated that it would take until the end of September 2014 to respond to the CPG's Third FOIA Request. Alice Yeh gave Mr. La Gravenis the opportunity to modify the request so that Region 2 could process the request within a shorter timeframe. Alice Yeh also asked Mr. La Gravenis to clarify sub-requests #4 and #5. On May 20, 2014, Alice Yeh sent Mr. La Gravenis an email documenting their conversation and asking him to agree to pay the costs of responding to the CPG's Third FOIA Request beyond the limits imposed through FOIAOnline. See Mugdan Decl. ¶ 100.

98. On May 21, 2014, Mr. La Gravenis sent an email responding to Alice Yeh's May 20, 2014 email. In his email, Mr. La Gravenis confirmed that CPG would pay the cost of responding to the CPG's Third FOIA Request. He also provided information clarifying sub-request #4 and #5. On May 23, 2014, Alice Yeh asked a follow-up question regarding sub-request #5, and Mr. La Gravenis responded to this email on May 23, 2016. See Mugdan Decl. ¶ 101, Ex. R.

EPA's Search for Responsive Records

99. Region 2 staff determined that, due to the number of records likely to be responsive to sub-request #4 (part 1) of the CPG's Third FOIA Request, EPA's Encase eDiscovery tool should be used for collection of email documents, and that the collected

documents should be reviewed using EPA's Relativity review software. See Mugdan Decl. ¶ 102.

100. Alice Yeh, Sarah Flanagan and Patricia Hick determined that 14 Region 2 employees in the Regional Administrator's Office, the Public Affairs Division, ERRD, and Office of Regional Counsel, might be custodians of e-mails responsive sub-request #4 of this FOIA request. The search terms used for all identified custodians for the Third FOIA Request, sub-request #4, were "Passaic," "Diamond," "LPRSA," and "FFS," in addition to two complex index queries, "17 w/1 mile" and "(interim OR early) w/1 action." The search was then constrained to seek emails to or from the identified custodians and 45 identified domains, which included common email domains used by outside parties (such as gmail.com, yahoo.com, or hotmail.com) in addition to the domains of known academic, governmental, and non-governmental organizations with an interest in the Lower Passaic River and that were thought likely to have communicated with Region 2 regarding the Lower Passaic River part of the Diamond Alkali Superfund Site. Because of the broad nature of the request, the search was not constrained by dates. The custodians and search terms were entered into an Excel spreadsheet formatted to allow the Region 2 Encase coordinator, Judy Rubin, to perform the search. In addition, the Region 2 staff identified by Alice Yeh as potential custodians of non-email records responsive to this request were contacted directly by Alice Yeh and at her request, the potential custodians searched their working files and notes for responsive documents. See Mugdan Decl. ¶ 103.

101. On May 21, 2014, Alice Yeh sent an email to Regional Administrator Judith Enck informing her of the CPG's Third FOIA Request, specifically sub-request #4, which sought "Any and all communications regarding the Lower Passaic River Study Area between any

member of the public and Judith Enck, including any alter egos or aliases of Administrator Enck. This information would include but not be limited to all letters, email (both official accounts and personal accounts used for official business), and any notes, records, reports, summaries or memoranda taken during or prepared after communications with members of the public relating to the LPRSA.” Alice Yeh informed Ms. Enck that Region 2 would use EPA’s eDiscovery software to search her work e-mail account, so she would not have to do so herself. Alice Yeh specified that Ms. Enck would need to search through all of the other communication methods listed above (personal e-mails used for official business, letters, notes, memos, etc.) for information responsive to this FOIA request (up to 5/14/14). See Mugdan Decl. ¶ 104.

102. On June 10, 2014, Steve Carrea, Ms. Enck’s Special Assistant, sent Alice Yeh an email stating that Ms. Enck’s materials responsive to the request described above had been uploaded to FOIAOnline. This was confirmed via email by Ms. Enck herself and by Wanda Calderon, the Region 2 FOIA Specialist. See Mugdan Decl. ¶ 105.

103. As of May 2016, Ms. Enck has confirmed that her search included all locations reasonably likely to contain responsive information to CPG’s Third Request. Ms. Enck has confirmed that she did not use her personal email account for communications regarding the Lower Passaic River Study Area with any members of the public. Ms. Enck has confirmed that she searched her paper files, including the paper files, notes, letters and memoranda referenced above, and her personal email account. See Mugdan Decl. ¶¶ 104, 105.

104. On June 4, 2014, Alice Yeh sent an email to custodians in the Public Affairs Division informing them of sub-request #5 (part 4) of the CPG’s Third FOIA Request and asking for responsive materials. These individuals either provided responsive materials or informed Alice Yeh that they had no responsive materials. See Mugdan Decl. ¶ 106.

105. On June 17, 2014, EPA Region 2 uploaded information (78 files) responsive to the CPG's Third FOIA Request to FOIAOnline as an interim response. In her transmittal letter dated June 10, 2014 to Mr. La Gravenis, Alice Yeh estimated that it would take until the end of September 2014 to respond to the FOIA request and gave him the opportunity to modify the request through FOIAOnline so that it could be processed within a shorter period. In the letter, Alice Yeh also directed Mr. La Gravenis to a table in an appendix of the Lower 8.3-Mile RI/FFS with information responsive to the FOIA request. See Mugdan Decl. ¶ 107, Ex. S.

EPA's Collection of Responsive Records

106. On June 18, 2014, Relativity Collection "ED_000018 – Diamond Alkali, Passaic River Focused" was created. EPA Region 2 created the folder with documents responsive to the CPG's Third FOIA Request on August 6, 2014. The final folder contained 10,560 potentially responsive documents. An additional 100 files from Region 2 staff's search of paper and electronic files were saved to in a designated drive on Region 2's computer network for review. In this way, Region 2 staff determined that all locations reasonably likely to have responsive information had been searched. See Mugdan Decl. ¶ 109.

EPA's Processing of Responsive Records

107. The steps for retrieving and processing the records in this FOIA response included review, categorization, and processing steps following the procedure as described in Paragraph 72 for the records collected in the Relativity workspace. For the response to the Third FOIA Request, however, Region 2 staff did not identify any of the responsive records in Relativity as "withhold in full under a FOIA exemption." In addition, the documents collected by Region 2 staff through review of their working files and notes were reviewed by Alice Yeh, Patricia Hick

and Sarah Flanagan, and the documents were identified for release, or release with redactions. All these documents were released, two with redactions. See Mugdan Decl. ¶ 110.

108. *Segregating Non-Exempt Material.* Region 2 staff conducted a line-by-line review of each record responsive to the CPG's Third FOIA Request for segregability of non-exempt material. Region 2 staff determined that, for the single document withheld in full, no meaningful portion could reasonably be released. Region 2 staff performed redactions where non-exempt material could be reasonably segregated and released non-exempt portions. See Mugdan Decl. ¶ 111.

109. In addition, after commencement of litigation, EPA's Office of General Counsel re-reviewed the withheld documents. See Mugdan Decl. ¶ 112.

EPA's Production of Responsive Records

110. EPA Region 2 uploaded the first installment on June 17, 2014 (78 files). The first production was produced electronically via FOIAOnline on June 17, 2014. See Mugdan Decl. ¶ 113, Ex. S.

111. On November 4, 2014, Bill Hyatt of the CPG sent a letter to Sarah Flanagan to discuss the status of the CPG's four FOIA requests. Regarding the CPG's Third FOIA Request, the letter indicated that CPG had not received substantive emails between Judith Enck and members of the community, and asked for a completion date. See Mugdan Decl. ¶ 114, Ex. P.

112. On November 13, 2014, Sarah Flanagan responded to Mr. Hyatt's letter. Regarding the CPG's Third FOIA Request, Sarah Flanagan stated that Region 2 provided responsive information and informed Mr. Hyatt that whether information is substantive is beyond scope of FOIA review. Sarah Flanagan also indicated EPA's intention to complete

review by the end of December 2014 and noted that EPA collected over 10,000 documents, but over 7,000 remained to review. See Mugdan Decl. ¶ 115, Ex. G.

113. On January 26, 2015, Mr. La Gravenis sent an email to Alice Yeh asking about the status of the CPG's Third FOIA Request. On January 29, 2015, Alice Yeh sent an email to Mr. La Gravenis informing that EPA Region 2 encountered technical issues with the interim release of responsive information. Alice Yeh revised her estimated completion date to March 2015. See Mugdan Decl. ¶ 116, Ex. T.

114. On March 16, 2015, Alice Yeh emailed Mr. La Gravenis revising the costs of responding to the CPG's Third FOIA Request and asking him to confirm that he would pay those costs. On March 17, 2015, Mr. La Gravenis sent an email confirming that CPG would pay the additional cost. See Mugdan Decl. ¶ 117, Ex. U.

115. On April 13, 2015, EPA Region 2 released the balance of the responsive information (3073 files) and a final letter dated March 20, 2015 to FOIAOnline. The final letter noted that Region 2 was withholding one responsive document and explained the basis for withholding. EPA Region 2 also sent an invoice through FOIAOnline. See Mugdan Decl. ¶ 118, Ex. V.

116. The CPG's Third FOIA Request sought seven categories of information, and Region 2 responded by releasing documents through FOIAOnline as follows:

- For sub-request #1, seeking an accounting of funds spent and/or committed to be spent in developing the April 11, 2014 Proposed Plan for the Lower 8 Miles of the [Lower Passaic River Study Area ("LPRSA")] and the reports and appendices thereto, including but not limited to the RI/FFS, EPA concluded that it did not have a document or documents responsive to this request.
- In response to sub-request #2, seeking any authorization for expenditure of funds for the Proposed Plan and the reports and appendices thereto, EPA released 33 documents showing commitments of funds under Interagency Agreement IAG DW96941975-01, which EPA understood to be responsive to the CPG's request.

- In response to sub-request #3, seeking all comments to the NRRB from the partner agencies (NOAA, USFWS, NJDEP and USACE), sent to EPA for transmittal to the NRRB and any EPA responses to such comments, EPA released four documents and withheld one, citing FOIA exemptions 5 and 7(A).
- In response to sub-request #4, seeking any and all communications regarding the LPRSA between: 1) any U.S. EPA personnel and any member of the Community Advisory Group or any other person purporting to be a representative of the community; and 2) any member of the public and Judith Enck, including any alter egos or aliases of Administrator Enck, including letters, email (both official accounts and personal accounts used for official business), and any notes, records, reports, summaries or memoranda taken during or prepared after communications with members of the public relating to the LPRSA, EPA released 3075 documents. Of these, 120 documents were redacted to remove personal information, and two were redacted to remove non-responsive information.
- In response to sub-request #5, seeking items related to the public hearing on the PP, held by EPA in Newark, NJ on May 7, 2014 (Hearing): 1) video and/or other recordings taken during the Hearing; 2) a transcript of the Hearing; 3) sign-in sheets for participants at the Hearing; 4) communications between Region 2 and members of the public regarding preparations for the Hearing (to the extent not covered by request 4); and 5) any petitions available for signature during the Hearing, EPA released 39 documents.
- In response to sub-request #6, seeking any documents relating to the designation of any portion of the Diamond Alkali Superfund Site as an operable unit, EPA did not produce any responsive information. Operable unit numbers are used by EPA for managing investigation and remediation at complex sites in phases. Region 2 did not identify documents discussing the designation of operable unit numbers, other than in correspondence to the CPG which was already in the CPG's possession.

See Mugdan Decl. ¶ 119.

117. *Production Numbers.* EPA Region 2 identified approximately 10,560 records as potentially responsive to the CPG's Third FOIA Request, of which Region 2 released 3,050 documents in full in response to the CPG's Third FOIA Request, and 122 documents with redactions as described above, and withheld one document. The remaining documents were determined to be duplicative or otherwise non-responsive to the CPG's First FOIA Request. As part of the re-review of this FOIA response, the EPA determined that 21 files that had been

intended for release had not been produced due to a technical error. These documents were provided to Plaintiff on May 11, 2016. See Mugdan Decl. ¶ 120 & n.5, Ex. J.

VIII. CPG's Fourth FOIA Request: EPA-R2-2014-007546

118. The CPG's Fourth FOIA Request sought all documents, including but not limited to emails, memos, reports and correspondence, that formed the technical basis for the New Jersey Department of Environmental Protection (NJDEP) Fish Advisory Levels, including but not limited to exposure assumptions, toxicity values, and target risk levels used by the NJDEP to derive the Fish Advisory Levels. See Mugdan Decl. ¶ 121.

EPA's Search and Response

119. On June 24, 2014, Alice Yeh discussed the CPG's Fourth FOIA Request by phone with three Region 2 staff from the Clean Water Division, one Region 2 staff from the Office of Policy and Management who was formerly from the Clean Water Division and one Region 2 staff from ERRD. The purpose of this discussion was to determine who in Region 2, if anyone, would potentially have records responsive to the Fourth FOIA request. See Mugdan Decl. ¶ 122.

120. The Clean Water Division staff person who was the New York/New Jersey Harbor Estuary Program ("HEP") coordinator said that he did not have any files related to the technical basis for NJDEP's fish consumption advisories. He did remember an effort by the HEP related to the different bases that the States of New York and New Jersey had for issuing fish consumption advisories on shared water bodies, but the effort did not result in any technical analyses being done on how each state sets fish consumption advisories. See Mugdan Decl. ¶ 123.

121. The Clean Water Division staff person responsible for reviewing the technical bases for state water quality standards said that he had not done any work on fish consumption advisories. He said that the Office of Policy and Management staff who was formerly from the Clean Water Division had dealt with fish consumption advisories. See Mugdan Decl. ¶ 124.

122. The Office of Policy and Management staff formerly from the Clean Water Division said that she worked on New York & Mohawk Nation advisories, not New Jersey. See Mugdan Decl. ¶ 125.

123. The Clean Water Division, Water Management Branch Chief said that he did not have any information responsive to the CPG's Fourth FOIA Request. See Mugdan Decl. ¶ 126.

124. The ERRD risk assessor for the Diamond Alkali Superfund Site, who was the team member most knowledgeable about fish and crab consumption advisories, said that she did not do any work on NJ fish consumption advisories, but forwarded two emails from Gary Buchanan of NJDEP, one with an attachment, that were responsive and were released as described below. See Mugdan Decl. ¶ 127.

125. Based on the search process described in Paragraphs 127 to 132, Alice Yeh determined that all individuals reasonably likely to have responsive information had been contacted and searches completed. See Mugdan Decl. ¶¶ 127-32.

EPA's Production of Responsive Records

126. On July 14, 2014, EPA Region 2 uploaded three documents responsive to the CPG's Fourth FOIA Request, as well as Alice Yeh's final response letter to Robert La Gravenis dated July 1, 2014 to FOIAOnline. EPA Region 2 also sent an invoice through FOIAOnline. Region 2 did not withhold or redact any information that was responsive to the Fourth FOIA request. See Mugdan Decl. ¶ 129, Ex. W.

IX. Coded Vaughn Index and Exemptions Applied

127. As described above, between April 28, 2014 and March 20, 2015, Region 2 collected over 66,000 electronic files, and reviewed them for responsiveness and FOIA exemptions in response to the CPG's four FOIA requests. Region 2 personnel searched their files and provided responsive information. During this time, Alice Yeh contacted Mr. La Gravenis on a number of occasions to inform him of the progress of Region 2's search and review. See Mugdan Decl. ¶ 130.

128. As described above Region 2 staff conducted a line-by-line review of each record responsive to the CPG's four FOIA requests for releasability, applicable exemption, and segregability of non-exempt material. Region 2 staff determined that for documents withheld in full, no meaningful portion could reasonably be released. Region 2 staff performed redactions where non-exempt material could be reasonably segregated and released non-exempt portions. See Mugdan Decl. ¶ 131.

129. When information was identified containing attorney-client communications, attorney work-product, and/or predecisional and deliberative information, Region 2 identified this information for withholding under FOIA Exemption 5, which applies to inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the affected agency. Where thought processes are woven into document to such an extent that any attempt at segregating information would reveal agency deliberations that information is also exempt from release under FOIA Exemption 5. Region 2 also identified information for withholding under FOIA Exemption 7(A) if the information was compiled for law enforcement purposes, the production of which could reasonably be expected to interfere with enforcement proceedings. Finally, Region 2 identified information for redaction and

withholding under FOIA Exemption 6 if the release of said information would constitute an unwarranted invasion of personal privacy. Individual documents may be withheld under multiple FOIA Exemptions, as described in the Coded Vaughn Index. See Mugdan Decl. ¶ 132 & n.6, Ex. X.

130. The final number of responsive documents to all four FOIA requests was approximately 6,721 records, with approximately 4,257 released in full, approximately 270 released with redactions, and approximately 2,191 withheld in full under one or more exemptions. By agreement between the parties, the withheld documents are described by category and code in the attached Coded Vaughn Index and are individually listed, except as noted below. See Mugdan Decl. ¶ 133, Ex. X.

131. The documents withheld in Category 17, which are 122 documents released in response to the Third FOIA Request with minor redactions under Exemption 6, have not been individually listed. In addition, as noted above, the documents released with redactions in the initial responses to the First and Second FOIA Requests have not been included in the Coded Vaughn Index. See Mugdan Decl. ¶ 133 n.7, Ex. X.

132. As explained above, and set forth in more detail in the withholding log enclosed with final response letter for CPG's First FOIA Request, in response to sub-requests #8 and #9, seeking correspondence between Region 2 and NRRB between November 21, 2012 and April 11, 2014, and between Region 2 and HQ on draft versions of the Proposed Plan and FFS documents, Region 2 withheld approximately 504 documents under Exemption 5. This request sought internal communications among EPA offices in the time leading up to EPA's issuance of the Proposed Plan, and accordingly, responsive information includes numerous sensitive communications in which legal enforcement staff participated. In addition, a limited amount of

information was withheld under Exemption 6 for protection of personal privacy. This information includes discussions of health and medical plans, leave and use of leave, as well as conference lines and conference codes. See Mugdan Decl. ¶ 134, Ex. X.

133. As explained above, and set forth in the withholding log enclosed with final response letter for CPG's Second FOIA Request, which sought all emails, correspondence and other documents relating to EPA's 2008 CSM and EMBM, and any comments, revisions or changes to the CSM that were considered by EPA in the development and issuance of the Proposed Plan, and EPA's June 2008 peer review of the CSM and EMBM, Region 2 withheld approximately 1,686 documents under Exemption 5 and 7(A). This request sought internal communications among EPA offices and among EPA and partner agencies in the time leading up to EPA's issuance of the Proposed Plan, and accordingly, responsive information includes numerous sensitive communications in which legal enforcement staff participated, including discussion of potential law enforcement activities. See Mugdan Decl. ¶ 135, Ex. X.

134. As explained above, in response to CPG's Third FOIA Request, Region 2 redacted portions of 122 documents on the basis of FOIA Exemption 6, and withheld one document on the basis of Exemptions 5 and 7(A). See Mugdan Decl. ¶ 136, Ex. X.

135. As explained above, no information was withheld from CPG in response to the Fourth Request. Therefore, the Fourth Request is not included in the Coded Vaughn Index. See Mugdan Decl. ¶ 137, Ex. X.

Dated: Newark, New Jersey
May 13, 2016

Respectfully submitted,

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